



December 18, 2001

Ms. Sarajane Milligan
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2001-5956

Dear Ms. Milligan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156284.

The Harris County Toll Road Authority (the "authority") received a request for information relating to two roadway projects, the Westpark Toll Road project and the Hardy Toll Road Downtown Connector project, including information on the right-of-way alignment, displaced owners, and status and timeline of each expenditure category. You claim that the responsive information is excepted from disclosure under sections 552.103 and 552.105 of the Government Code. We have also received arguments from the requestor. *See* Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted representative samples of information.¹

Initially, we note your assertion that the documents responsive to the request for the Westpark Toll Road project are the exact documents that were at issue in an earlier ruling from this office, Open Records Letter No. OR2001-4549(2001). You inform us that the litigation at issue in the earlier ruling is still ongoing. On this basis, we conclude that, except

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

as noted below, you must rely on that ruling as a previous determination and withhold the requested information pertaining to the Westpark Toll Road project, which you have submitted as Exhibit B, in accordance with OR2001-4549 (2001). *See* Open Records Decision No. 673 (2001) (so long as law, facts, the circumstances on which prior ruling was based have not changed, the first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that the information is or is not excepted from disclosure).

We note, however, that some of the information pertaining to the Westpark Toll Road project, as well as information relating to the Hardy Toll Road Downtown Connector project, which you have submitted as Exhibit C, is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate

Therefore, the completed appraisal reports contained in Exhibits B and C are subject to section 552.022(a)(1). In addition, the submitted project cost summaries in Exhibit C may be subject to section 552.022(a)(5). The cost summaries consist of working papers used to estimate the need for and expenditure of public funds by the authority. Thus, to the extent that the total estimate for the project has been completed, the cost summary for the project in Exhibit C is public under section 552.022(a)(5). Both the appraisal reports and any cost summaries subject to section 552.022 must be released unless they are excepted from disclosure under section 552.108 or are expressly confidential under other law. You do not contend that the submitted information is excepted under section 552.108. Furthermore, sections 552.103 and 552.105 are discretionary exceptions and are not "other law" for the purpose of section 552.022. Open Records Decision Nos. 663 (1999) (governmental body may waive sections 552.103 and 552.111), 564 (1990) (governmental body may waive statutory predecessor to section 552.105). Consequently, we find that you must release the submitted appraisal reports in Exhibits B and C, which we have marked, as well as any of

the submitted cost summaries in Exhibit C, which we have also marked, relating to projects for which the total estimate has been completed.

If the total estimates to which the cost summaries relate have not been completed, we address your argument for these summaries, as well as the submitted maps, under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). This office has concluded that information about specific parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. Open Records Decision No. 564 at 2 (1990). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. Open Records Decision No. 564 (1990).

You state that the submitted information relates to roadway projects that have already been publicly announced by the Harris County Commissioner's Court. You further state that while the authority has successfully acquired some of the land for the project at issue, there are acquisitions that are pending or yet to be initiated. Therefore, you contend that release of the submitted information would impair the authority in negotiating deals for the remaining parcels by revealing the property designated for acquisition as well as pricing information on the property. Based on your arguments and our review of the submitted information, we agree that the cost summaries are excepted from disclosure under section 552.105 to the extent they are not otherwise subject to section 552.022(a)(5). However, because the projects have already been publicly announced, we find that the submitted maps, which relate to the location of real property affected by the project, are not excepted from disclosure under section 552.105.

You also contend that the maps are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The authority has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The authority must meet both prongs of this test for information to be excepted under 552.103(a). To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986).

You indicate that Harris County has instigated condemnation proceedings to acquire property for the project at issue. You further indicate that there remains property to be acquired for the project at issue. You further contend that the maps relate to these pending and anticipated condemnation proceedings because they "show the property to be affected by the proposed roadway projects and which properties will have to be acquired by Harris County for the projects." Based on our review of your representation and the submitted information, we conclude that you have demonstrated that litigation is pending and that the submitted maps in Exhibit C are related to that litigation for purposes of section 552.103. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.--Austin 1997, no pet.) (information need not be relevant to substantive issues in litigation in order to relate to litigation for purposes of Public Information Act). Accordingly, we conclude that the authority may withhold from disclosure the maps in Exhibit C pursuant to section 552.103 of the Government Code.

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, you must withhold the requested information pertaining to the Westpark Toll Road project, which you have submitted as Exhibit B, in accordance with OR2001-4549 (2001), with the exception of the completed appraisal report, which must be released in accordance with section 552.022(a)(1). With regard to the remaining information relating to the Hardy Toll Road Downtown Connector project, which you have submitted as Exhibit C, you must release the submitted appraisal report and any of the submitted project cost summaries relating to projects for which the total estimate has been completed, pursuant to section 552.022. You may, however, withhold the project cost summaries under section 552.105 of the Government Code if the total estimate to which they relate has not been completed. The submitted maps in Exhibit C may be withheld under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 156284

Enc. Submitted documents

c: Mr. Brett B. Warren
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(w/o enclosures)